"Except where the Food Controller shall otherwise authorize . . . .". The Food Controller can therefore give a complete dispensation from all normal rationing rules. This is entirely consonant with clause 4 of the Food Control Proclamation, under which the Regulations are made.

It is contended for the accused that, by allowing retailers to purchase the 1% allowance and not requiring them to account in any way for such surplus as may remain after satisfying transit and packaging losses, the Controller has in effect decontrolled sugar to the extent of any such surplus, and in the absence of any directions from him how it shall be disposed of, it must be assumed that the owner can dispose of it in any way he wishes. He cannot *ex hypothesi* sell it as rationed, for it is surplus to rationing requirements. Must he then destroy or personally consume it? The learned Deputy contends that he ought to report the position to the Deparment and hold the sugar at their disposal, but *non constat* that they desire that, and it seems improbable that they would wish to repurchase it. In any event, he continues, whatever else the retailer may do, he must not sell it. I asked if he could give it away, and the learned Deputy at first conceded that he could, though I think he later receded from that. If the Regulations had dealt only with sales of sugar, I could appreciate that distinction, but they do not; they deal with "obtaining" and "supplying" and "offering". I cannot see that a gift is any more permissible than a sale. They stand or fall side by side.

There is the further point that, in creating rights in the retailer to dispose in some way or other of this sugar, the Controller is in the position of a grantor, whose implied grant the Court has to construe as best it can. Such a grant is to be read in favour of the grantee rather than the grantor if in writing. If it is implied from circumstances and the grantor contends that it is subject to a reservation or proviso, it is for him to establish that. As I find it impossible to understand the nature or extent of the alleged reservation or proviso, I am driven to conclude that there was none. It would have been easy for the Controller to say "You may have this 1% allowance, but must not sell it," but he has not done so. In distributing it as an uncontrolled article, I think he has given implied authority, within the meaning of the Regulations, to the retailer to "offer" and "supply" and to the public to "obtain" it, in such manner otherwise lawful as they may wish. Although the second accused certainly, and the first accused probably, thought the first accused had sold unlawfully, they were wrong. The sale was a lawful sale and the second accused's appeal must be allowed and the conviction set aside. The conviction of the first accused having been erroneous for the reasons given, I deal with his case under revisionary powers and his conviction also is set aside. The fines will be refunded.

Order accordingly.

SALLEH BIN HAJI SAHID v. ISMAIL BIN HAMID & ANOR.

[Orig. Civ. Juris. (Spenser Wilkinson, J.)
January 16, 1952]

[Penang — Civil Suit No. 106 of 1951]

Limitation Ordinance, arts. 104 and 112, s. 25 — Limitation (Enemy Occupation) Ordinance, 1946 — Mortgage — Death of mortgagor — Non-payment of interest — Mortgagee exercising power of sale.

In this case the 1st defendant's father owned a piece of land in Province Wellesley. On the 25th June 1929, i.e., about a year before his death, he mortgaged the land to a Chettiar to secure repayment of the sum of $100/- with interest thereon at the rate of 2% per month payable monthly. The repayment date in the Mortgage Deed was 25th June 1930. The mortgagor died on the 6th May 1930 and no interest was paid on the mortgage since his death. The 1st defendant, who during his father's lifetime had been working on the land with him, continued to work thereon after his father's death and there was no doubt that he remained in possession of the land from the date of his father's death until the 20th January 1950. He purported to sell the land to the 2nd defendant but in the meantime, on the 6th of February 1950, the personal representative of the deceased chettiar mortgagee sold the land under the power of sale by public auction to the plaintiff and the plaintiff claimed possession of the land in this suit. The defendants pleaded limitation.

Held, that the purchaser from the mortgagee exercising his power of sale acquires a new title and limitation runs anew from this date against him.

Cases referred to :—

(1) *In re Marie Louise Caunter, deceased* (1938) M.L.J. 174.

(2) *Pugh v. Heath* 6 Q.B.D. at p. 357; (1881-82) 7 A.C. 235.

CIVIL SUIT.

Sonni Pillai for the plaintiff.

Lim Kheng Kooi for the defendants.

Cur. Adv. Vult.

Spenser Wilkinson, J. : — The facts in this case are not in dispute. The 1st defendant's father owned a piece of land in Province Wellesley. On the 25th June, 1929, that is about a year before his death, he mortgaged the land to a Chettiar to secure repayment of the sum of $100 with interest thereon at the rate of 2% per month payable monthly. The repayment date

in the Mortgage Deed was 25th June, 1930. The mortgagor died on the 6th May, 1930 and no interest has been paid on the mortgage since his death. The 1st defendant, who during his father's lifetime had been working on the land with him, continued to work the land after his father's death, and there is no doubt that he remained in possession of the land from the date of his father's death until, on the 20th February, 1950, he purported to sell the land to the 2nd defendant.

Meantime, on the 6th February, 1950 the personal representative of the deceased Chettiar mortgagee sold the land under the power of sale by public auction to the plaintiff, and the plaintiff now claims possession of the land. The defendants plead limitation.

I think there can be no doubt that the sale of the property by the mortgagee's personal representative took place within the limitation period of twelve years from the time when the mortgagee first became entitled to possession. It appears from the authorities that a mortgagor's possession is permissive and not adverse to the mortgagee unless and until a default is made in payment of the principal and interest. Time, therefore, begins to run against the mortgagee from the first default in payment of interest (*Coote* on Mortgages, 9th edition, 1098 and *Rustonji* on Limitation, 5th edition, 1217). The first payment of interest after the death of the 1st defendant's father was due on the 25th May, 1930, so that interest was in arrear and unpaid for one month on the 25th June, 1930 and the mortgagee would then have been entitled to take possession or to adopt any of his other remedies. Time, therefore, began to run from that date against the mortgagee under Article 104 of the Schedule to the Limitation Ordinance; but by virtue of the Limitation (Enemy Occupation) Ordinance, 1946 time ceased to run from the 1st January, 1942 until the lifting of the moratorium on the 1st October, 1949, so that time ran up till the 31st December, 1941 for 11 years 6 months and 5 days and again from the 1st October, 1949 until the sale on the 6th February, 1950 for 4 months and 5 days, making a total of 11 years 10 months and 10 days. Thus the sale by the mortgagee under his power of sale took place within the twelve year period of limitation.

The Writ in this action, however, was not issued until 2nd April, 1951 and it was contended by the defendants not only that the Suit is barred by limitation but also that by virtue of section 25 of the Limitation Ordinance the title of the mortgagee was extinguished before this action was brought, because the twelve year period expired before the 2nd April, 1951. The defendants relied in the first place on Article 104 of the Schedule to the Ordinance, but in my opinion this Article is not applicable to the present Suit. This is not a Suit by a mortgagee against his mortgagor but by a purchaser who has purchased the whole property and in my opinion the only Article applicable is Article 112.

Under Article 112 time begins to run when the possession of the defendants becomes adverse to the plaintiff and it was argued by the defendants that in this Article the word "plaintiff" means in effect the plaintiff or his predecessor. That may be so in the case of a derivative claim, but I cannot accept this contention in relation to the facts of this case. A purchaser from a mortgagee under his power of sale does not claim through the mortgagee in the sense that a transferee would; indeed he has a title greater than the mortgagee had because the exercise of the power of sale destroys the equity of redemption.

In my opinion the possession of the defendants could only become adverse to the plaintiff on the date when the plaintiff purchased the property; and a new period of limitation began to run against the purchaser from that date. No direct authority upon this question was cited to me, and the case of *In re Marie Louise Caunter, deceased*[1], upon which the defendants rely, does not appear to me to be in point. All that was decided there was that after twelve years the right to foreclosure is barred notwithstanding the provisions of Article 114. But the case of *Pugh v. Heath*[2] appears to me to support the view I have formed. The judgment of the Lord Chancellor in the Court of Appeal in that case was the basis of the decision of the House of Lords, and the following passages from that judgment appear to me to be relevant:—

> "When the owner of land under an ordinary decree of foreclosure absolute takes proceedings to recover possession of that land, he seeks possession of that which, by a title newly accrued, has for the first time become his own property....." (at page 361).

> "After the commencement of the suit, which ended in the foreclosure, it was no longer possible that the statute should run against that title. The new title by foreclosure first accrued upon and by reason of the forfeiture of the defendant's equity of redemption....." (at page 363).

In that case it was the mortgagee himself who acquired a new title by foreclosure; but in the same way (to paraphrase the further remarks of the Lord Chancellor at page 361 of the same report) the purchaser from a mortgagee acquires a title, newly accrued, and the possession which he now claims and the right by virtue of which he seeks to recover it are substantially different from the possession which the mortgagee might before have claimed and from the

right by virtue of which the mortgagee might have claimed it.

When the plaintiff bought this property at the mortgagee's sale he acquired a new title by reason of the forfeiture of the defendant's equity of redemption and it was then for the first time that the possession of the defendants became adverse to him. In my opinion, therefore, the plea of limitation fails, and there must be judgment for the plaintiff with costs.

Judgment for the plaintiff.

NOORDIN BIN MAT DOM v. YAHAYA BIN MOHAMED JALIT.

[Orig. Civ. Juris. (Thomson, J.) January 17, 1952]

[Ipoh — Civil Suit No. 22 of 1951]

Contract — Administrator de bonis non — Contract for sale of land by — Contract Ordinance, s. 47 — Specific Relief Ordinance, ss. 13 and 14 — Measure of damages.

The defendant in this case who was the administrator of the intestate estate of one Mohamed Jalit deceased entered into a contract to sell land to the plaintiff in 1944 and signed the following document:—

"Whereas I, the undersigned, Mohamed Yahaya bin Jalit agree to sell my rubber estate land the area being 5A. OR. 28P. Mukim Batang Padang Lot No. 1954 in cash which I had received was from the hand of Noordin bin Mat Dom who was the one desirous of purchasing it amounting to two thousand and five hundred dollars ($2,500).

"The agreement being that when the administration is completed then only will I transfer this land to the name of Noordin bin Mat Dom, and furthermore anyone of the beneficiaries cannot make a claim over this said land.

"That is all and I hereunder append my signature in the presence of witnesses.

I the undersigned,
Sd. J. M. Yahaya
(Yahaya bin Mohamed Jalit).

Witness.

1. Sd. ?
2. Sd. ?"

In early 1950 the plaintiff entered on the land to tap rubber trees and then sought specific performance of the contract. A counterclaim was made for profits.

Held, (1) that the agreement of sale was of whole land therein described and not only the defendant's share; (2) that the agreement did not require the defendant to apply to Court for an order permitting him to transfer the land; (3) that the agreement was made by the defendant not as administrator but in his personal capacity.

Held further, that the contract was to be performed within a reasonable time and the defendant was in default but as specific performance was not in the personal capacity of the defendant the plaintiff was entitled to damages against him personally for the loss of his bargain the measure of which was what the land would fetch in the open market.

Held on the counterclaim, that the plaintiff was liable to account to the defendant as administrator for profits.

Cases referred to:—

(1) *Vyramuttu v. State of Pahang* 4 F.M.S.L.R. 277.

(2) *Bain v. Fothergill* L.R. 7 H.L. 158.

(3) *Lim Yew Soon v. Gan Chye Neo* 2 F.M.S.L.R. 5.

(4) *Palaniappa Chettiar v. Letchumanan Chettiar* (1950) M.L.J. 274.

(5) *In re Richardson* (1933) W.N. 90.

CIVIL SUIT.

M. S. Mahendran for the plaintiff.

K. C. Chan for the defendant.

Cur. Adv. Vult.

Thomson, J. : — The defendant in this suit is the administrator *de bonis non* of the estate of one Mohamed Jalit, who died in 1923. Administration of the estate was originally granted to the widow of the deceased who herself died in 1937 without having taken any steps towards distributing it and Letters of Administration *de bonis non* were granted in 1938 to the defendant who is the eldest surviving son of the deceased and is beneficially entitled to either a third or a fifth share in the estate. The assets of the estate, which are apparently no nearer distribution now than they were in 1923 consist of a number of pieces of land one of which is the land held under Mukim Batang Padang, E.N.R. No. 1902 for Lot No. 1954.

In October, 1944, during the Japanese occupation, certain negotiations took place between the plaintiff and the defendant relating to Lot 1954 and in the event the plaintiff paid to defendant the sum of $2,500 in Japanese currency and received in return the document of title to the land and a document in the Malay language executed by the defendant of which the following is a translation by the Court Interpreter:—

Agreement.

"Whereas I, the undersigned, Mohamed Yahaya bin Jalit agree to sell my rubber estate land the area being 5A. OR. 28P. Mukim Batang Padang Lot No. 1954 in cash which I had received was from the hand of Noordin bin Mat Dom who was the one desirous of purchasing it amounting to two thousand and five hundred dollars ($2,500).

"The agreement being that when the administration is completed then only will I transfer this land to the name of Noordin bin Mat Dom, and furthermore anyone of the beneficiaries cannot make a claim over this said land.

"That is all and I hereunder append my signature in the presence of witnesses.

I the undersigned,
Sd. J. M. Yahaya
(Yahaya bin Mohamed Jalit).